

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION**

**In Re: CERTIFICATION PROCESS OF)
GAS SERVICE EMPLOYEES)**

DOCKET NO. 3438

MOTION FOR A STAY OF ADMINISTRATIVE PROCEEDINGS

Pursuant to Rule 1.15 of the “Rules of Practice and Procedure” of the Public Utilities Commission (“Commission”, the Attorney General hereby moves for a stay of all the administrative proceedings in this docket, including discovery, until litigation in U.S. District Court affecting this docket has been concluded.

DISCUSSION

One of the parties to this docket, Southern Union Company doing business as New England Gas Company (“NEG”) has initiated two separate actions in U.S. District Court for the District of Rhode Island: (1) *Southern Union Company dba New England Gas Company v. Rhode Island Division of Public Utilities and Carriers et al.*, Case No. 02-316T; and, (2) *Southern Union Company dba New England Gas Company v. Whitehouse*¹, Case No. 02-405L. The State of Rhode Island (or one or more of its agencies) is the defendant in both cases, with the Attorney General specifically listed as a named defendant.

The first case attacks the validity of R.I.Gen.Laws § 39-2-23 on the grounds that it is inconsistent with, and contrary to, the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* and the Supremacy Clause of the U.S. Constitution, U.S. Const., Art. VI, cl.2.

¹ This case was brought against Sheldon Whitehouse in his capacity as Attorney General. The case title will no doubt be changed to reflect the change in administration to reflect Patrick C. Lynch as the new defendant.

The second case attacks the validity of several Rhode Island statutes, the interpretation of which are at the heart of this administrative docket. First of all, NEG has alleged that “The Pipefitters Act,” R.I.Gen.Laws § 28-27-1 *et. seq.*, has been preempted by Federal Law and Regulations, specifically by “The Natural Gas Pipeline Safety Act of 1968,” 49 U.S.C. § 60101 and 49 C.F.R. Part 192, “Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards.” Second, NEG has alleged that “The Pipefitters Act” has been preempted at the state level by R.I.Gen.Laws § 39-1-1 *et seq.* Finally², NEG is claiming that it is exempt under the terms of Section 29 of “The Pipefitters Act,” R.I.Gen.Laws § 28-27-29(a).

The interpretation and validity of these same Rhode Island statutes are in issue in this docket, just as they are in U.S. District Court. Some of the same agencies that are named defendants in one or both of these Federal District Court actions are parties in this administrative docket.³

Under the law of this state, the Attorney General is charged with defending both the state and the constitutionality and legality of the laws of this state. *See Const. R.I.*, Art. IX, § 12; R.I.Gen.Laws § 42-9-6. In this case, the Commission has asked multiple state agencies (many, if not all, named defendants in the two federal court cases) to offer

² Actually, NEG raises two additional issues concerning the validity of regulations promulgated by the Rhode Island Department of Labor and Training, but those issues are only peripheral to this administrative docket.

³ The Commission itself is a defendant in the first court action, as well as being charged with the responsibility of serving as the trier of fact in this docket. To make matters worse, the plaintiff naming the Commission as a defendant in District Court is one of the parties in this administrative. Thus, the Commission is a defendant in one forum and the trier of fact in a second forum, both dealing with the same questions of law. It is difficult to see how the Commission can be expected to act as an impartial trier of fact in the administrative docket with respect to NEG when it is locked in a struggle with NEG over the same questions of law in U.S. District Court. Any decision rendered by the

their interpretation of the statutes in question in U.S. District Court, making it crystal clear that the Commission is considering the same issues as our currently before the federal court. It has become apparent that the ongoing litigation before the Commission, particularly as the parties continue through discovery, has the potential to interfere with the ability of the Attorney General to carry out his constitutional and statutory duties of defending those same agencies (including, incidentally, the Commission itself) and the laws of the State of Rhode Island.

Accordingly, in order to avoid interfering with the ability of the Attorney General to carry out his duties, we ask that the Commission defer any further action in the instant docket until such time as the courts have issued their decision with respect to the legal issues before both the courts and this Commission.

We would note that by staying this matter until the courts have acted, the Commission will be able to take its own actions in the light of those judicial determinations, and will not run the risk of issuing its own decision only to have the legal underpinnings of that decision pulled out from under it by a decision of the court. Further, this will go far toward eliminating the current conflict of interest inherent in this situation where the Commission is both a defendant in the courts and a trier of fact at the administrative level in the same matter. Finally, deferring action until the legal issues are resolved in court (at least where an action has already begun in court) is consistent with the past practices of the Commission⁴ and reflects an appropriate and prudent deference to federal judicial authority.

Commission on a question of law under these circumstances would surely be challenged on due process grounds.

⁴ See *In Re Pawtucket Water Supply Board Application To Change Rate Schedules*, PUC Order No. 15664, Docket No. 2674, dated August 3, 1998, pp 75-77, 83; *In Re Pawtucket*

At the present time, it is our belief that the courts will issue their decisions in the two cases by mid-summer or shortly thereafter.

MOVANT'S CERTIFICATION

The movant hereby certifies that he has made a good faith effort to determine whether or not this motion will be opposed by contacting each individual on the official service list for this docket via electronic mail. The movant specifically asked that the other parties concur in this motion. The Division, the Department of Labor and Training, and the Union have indicated that they do not oppose the motion; NEG has not taken a final position on the motion, but its preliminary indication was that it would not oppose the motion.

Respectfully submitted,

PATRICK C. LYNCH
ATTORNEY GENERAL OF THE
STATE OF RHODE ISLAND
By his attorney,

February 4, 2003

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Water Supply Board Application To Change Rate Schedules, PUC Order No.14535, Docket No. 2158, dated September 1, 1994, p. 81 (in both cases, the Commission deferred to the Superior Court for a decision on the legal issues raised by a franchise contract). *But see In Re Pawtucket Water Supply Board Application To Change Rate Schedules*, PUC Order No. 17349, Docket No. 3378, dated January 23, 2003, fn. 95 (Commission elected to proceed in the case although Superior Court had not yet resolved legal issues surrounding contract, but only after determining that such action was justified under Commission's R.I.Gen.Laws § 39-1-32(b) emergency powers where the utility was in imminent danger of ceasing to provide service to its customers.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the within document was served this 4th day of February, 2003, via first class mail, postage prepaid, upon each person designated on the official service list in this proceeding.

February 4, 2003

BY HAND DELIVERY

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

Re: **Certification Process of Gas Service Employees, Docket No. 3438**

Dear Ms. Massaro:

Enclosed for filing in the above-captioned proceeding are an original and nine (9) copies of the Attorney General's Motion For A Stay Of Administrative Proceedings.

Very truly yours,

William K. Lueker (#6334)
Special Assistant Attorney General

Enclosures
cc: Service List